of the Federal government to compel its enforcement. That being the case, the state to which a man had fled might be induced to give him up if he were charged with one crime, and not, if with another. Now if, after being returned, the defendant were to be tried upon a different charge, that would be extremely bad faith with the surrendering state, as well as with the prisoner.

In conclusion, it is interesting to note, in this connection, that if a man is tricked into the jurisdiction, or is kidnapped and forcibly carried back, he, nevertheless, has no defense on that score.[12]

J. F. N.

DAMAGES—LOSS OF WIFE'S SERVICES—PROXIMATE CAUSE—The Court of Appeals of New York, held in a recent decision[1] that a husband may maintain an action for damages for the physical illness of his wife, consequent upon mental anguish caused by the publication of words reflecting upon her character, which were libelous *per se*. The court proceeded upon the ground that the rights of the husband were co-extensive with those of the wife; that if she could recover damages for such injuries, he could also. The primary inquiry of the court was as to the measure of damages recoverable by the wife if she had brought suit instead of her husband.

Earlier decisions in New York hold that proof of mental distress and physical illness resulting therefrom will not give a right of recovery either to the person libeled[2] or her husband[3] where the alleged defamatory matter is not libelous *per se*. This view seems to represent the trend of modern authority[4] and to be correct on principle. The gist of the action for defamation is the injury to the plaintiff's reputation; mental distress and sickness do not prove the fact of such injury, but are simply the results of an apprehension of injury. Baron Bramwell said in *Alsop* v. *Alsop*:[5] ". . . the law holds that bodily illness is not the natural nor the ordinary consequence of speaking slanderous words. Therefore, on the ground that the damage here alleged is not the natural

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[12] Mahon v. Justice, 127 U. S. 700 (1887).

[1] Garrison v. Sun Printing and Publishing Ass'n, 100 N. E. Rep. 430 (N. Y., Dec. 17, 1912); affirming 150 App. Div. 689 (N. Y., 1912).

[2] Terwilliger v. Wands, 17 N. Y. 54 (1858).

[3] Wilson v. Goit, 17 N. Y. 442 (1858).

[4] Alsop v. Alsop, 5 H. & N. 534 (Eng., 1860); Guy v. Gregory, 9 Car. & P. 584 (Eng., 1840); Shafer v. Abott, 48 Ind. 171 (1878); Beach v. Ranney, 2 Hill 309 (N. Y., 1842); Terwilliger v. Wands, *supra*, which specifically overrules two earlier New York decisions; Bradt v. Towsley, 13 Wend. 253 (N. Y., 1841); and Fuller v. Fenner, 16 Barb. 333 (N. Y., 1854). *Contra*, Zeliff v. Jennings, 61 Tex. 458 (1863).

[5] 5 H. & N. 534 (Eng., 1860). In Lord Campbell's opinion in Lynch v. Knight, 9 H. L. 592 (1861), he said: "I think that *Alsop* v. *Alsop* was well decided, and that mere mental suffering or sickness, supposed to be caused by the speaking of words not actionable in themselves, would not be special damage to support an action."

consequence of the words spoken by the defendant, I think that this action will not lie."

On the other hand, when the defamatory matter is libelous *per se* an injury to the plaintiff's reputation is presumed, and proof of mental suffering with resulting illness is offered simply as an element of additional damage which the jury are entitled to consider. This view seems to be settled law in the majority of jurisdictions.[6] Therefore, under the facts of the principal case there seems to be no question but that the wife of the plaintiff, if she had sued, could have recovered damages for her mental and physical suffering.

The Court of Appeals, having arrived at this conclusion, then said that it followed logically that her husband could recover damages for the loss of her services. It is on this point that the difficulty arises in accepting the decision as technically correct. The question involves the true basis of a husband's right to recover for injuries to his wife. Physical illness, following mental distress, is too remote to give the wife a right of action when, to succeed, it is necessary for her to show special damage, *i. e.*, when the defamatory matter is not libelous *per se*. If her husband must show damage to himself, and unless he has an action irrespective of such damage which vests in him automatically by a wrong to his wife, it would seem to follow necessarily that such damages were likewise too remote to sustain his suit.

The proposition that a husband may recover for wrongs to his wife which result in a loss to him of her *consortium* or services has become so thoroughly established that modern cases are of little assistance in determining the basis of his action, the rule usually being applied to the circumstances with little or no analysis. In *Robert Mary's Case*,[7] it was said: "And therefore, if my servant is beat, the master shall not have an action for this battery, unless the battery is so great that by reason thereof he loses the service of his servant, but the servant himself for every small battery shall have an action; and the reason of the difference is, that the master has not any damage by the personal beating of his servant, but by reason of a *per quod, viz.*: *per quod servitium, etc., amisit;* so that the original act is not the cause of his action, but the consequent upon it, *viz.*: the loss of his service is the cause of his action; for be the battery greater or less, if the master does not lose the services of his servant, he shall not have an action." It would seem that the same principles are applicable to the relation of

[6] Swift v. Dickerman, 31 Conn. 285 (1863); Farrand v. Aldrich, 85 Mich. 593 (1891); Bolt v. Budwig, 19 Neb. 739 (1886); Taylor v. Hearst, 107 Cal. 262 (1895); Hastings v. Stetson, 130 Mass. 76 (1881); Chesley v. Thompson, 137 Mass. 136 (1884); Van Ingen v. Star Co., 1 App. Div. 429 (N. Y., 1896). *Contra*, Prime v. Eastwood, 45 Ia. 640 (1877), in which the court says that there should be no distinction between words slanderous *per se*, and words requiring proof of special damage to support an action. In Butler v. Hoboken Co., 73 N. J. L. 45 (1907), the court held that while damages might be recovered for mental distress, illness resulting therefrom was too remote.

[7] 9 Co. Rep. 113 (1613).

husband and wife. Blackstone says: "But if the beating or other maltreatment be very enormous, so that thereby the husband is deprived for any time of the company and assistance of his wife, the law then gives him a *separate* remedy by an action of trespass, in nature of an action upon the case, for this ill usage, *per quod consortium amisit;* in which he shall recover a satisfaction in damages."[8]

The case of *Guy* v. *Livesey*,[9] decided in 1619, shows the application of this principle. There the defendant had assaulted both the husband and the wife, and the former sued in two counts, one for the assault on himself and the other for the assault on his wife. It was objected that his wife should have been joined in the second count, for if she survived her husband she would also have an action in respect of her damages, and the defendant would have to pay twice for the same wrong. The court overruled this objection on the ground that the count for the battery of the wife was not brought for the harm done to her, but for the injury to himself; that is, his loss of his wife's *consortium* was the direct and immediate result of the defendant's wrong.

At common law the husband and wife had to join in suing for torts committed against the wife, the wife because she was wronged and the husband for conformity.[10] For special damage to himself, such as loss of society or services, the husband had to bring a separate action.[11] Where defamatory matter was only actionable because of special damage, he alone could sue.[12] In *Russell* v. *Corne*,[13] decided in 1702, the action was by husband and wife for a battery of the wife; there were several counts for beating the wife, and one count for beating her *per quod* the business of the husband remained undone. On a verdict for the plaintiff it was objected that the wife was improperly joined, but it was held that the gist of the action was the beating of the wife, and that the *per quod* was only in aggravation of damages. Chief Justice Holt said: "If it had been, *per quod consortium amisit*, the wife could not have been joined." And by Powell, J.: "There the *per quod etc.* is the gist of the action, to allow a husband to maintain an action alone without his wife. But now as this case is, I will not intend, that the judge allowed any evidence to be given as to the special damage to the husband; but only admitted proof as to the battery."

It is submitted that these cases show that the basis of the husband's action is the damage to himself resulting from the incapacity of his wife. For him to recover he must have shown

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[8] 3 Bl. Com. 140.
[9] Cro. Jac. 501 (1619).
[10] Crawley, Husband and Wife, p. 273; Weldon v. Winslow, 13 Q. B. D. 784 (1884); Hamner v. Mangles, 12 M. & W. 313 (1845).
[11] Litfield v. Mellierse, God. 369 (1627); Coleman v. Harcourt, 1 Lev. 140 (1663); Dengate v. Gardiner, 4 M. & W. (Eng., 1838).
[12] 1 Siderf. 346 (1644).
[13] 2 Ld. Raym. 1031 (1702).

that he in fact suffered such an injury; this injury or damage must be entirely distinct from the injury to his wife, for, as shown above, in such case he could not be joined with her, but must sue alone. If this conclusion be true, that a husband has no right of action purely and simply because of a wrong to his wife, it follows necessarily that the decision of the Court of Appeals cannot be sustained as technically correct. If, as the court stated, mental distress and physical illness are too remote consequences of a defamatory publication to give the person libeled an action when he must prove special damage, it necessarily follows that they are too remote to support the plaintiff's action in the principal case. Mental distress coupled with physical illness are a "parasitic" form of damages: when an injury is independently proved they may be considered in estimating the amount of that injury, but they cannot in themselves be made the basis of an action.[14]

S. A.

INTERSTATE COMMERCE—EXCLUSIVENESS OF FEDERAL POWER —The problem of defining accurately the exact limits of state and Federal authority respectively, upon matters relating to interstate commerce, and of determining when Federal legislation upon a particular subject is or is not meant to suspend all State rules in the same field is one of the most important and complex questions which confront the courts today. The difficulty arises in the application of the well settled doctrine, definitely announced in *Smith* v. *Alabama*,[1] that in the absence of legislation by Congress upon matters relating to interstate commerce a kind of neutral ground is established in which state regulations, passed under the police power and governing matters of local concern, are valid until Congress chooses to act upon the particular subject.[2] The controversies arising under this doctrine turn upon the question as to whether or not a particular Act of Congress is properly applicable to the subject matter of the case, and as to

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[14] Lord Wensleydale in Lynch v. Knight, 9 H. L. 598 (1861): "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone; though where a material damage occurs, and is connected with it, it is impossible a jury, in estimating it,should altogether overlook the feelings of the party interested."

See note to Huston v. Freemansburg, 3 L. R. A. (N. S.) 1 (1906) where cases are collected allowing recovery for fright and resulting illness when there has been an actual, if technical, trespass, but refusing such recovery where such damage solely results from the wrongful act and no trespass is shown.

See also, Street, Foundations of Legal Liability, Vol. 1, p. 461.

[1] Smith v. Alabama, 124 U. S. 465 (1887).

[2] The doctrine of Smith v. Alabama is directly affirmed in Chic. Mil. & St. P. Ry. v. Solan, 169 U. S. 133 (1897), and in Penna. R. Co. v. Hughes, 191 U. S. 477 (1903).

In Southern Ry. v. Reid, 222 U. S. 424 (1911), it was expressly stated that there were three degrees to which the states might exercise power over commerce. First, exclusively; second, in the absence of legislation by Congress, until Congress does act; and third, where Congress having legislated, the power of the state cannot operate at all.